APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESLIE ANDREW HANLON Plaintiff-Appellee, v. SAMUEL A. LEWIS Defendant-Appellant.	No. 95-15869 D.C. No. CIV 92-1506 PHX EHC **MEMORANDUM***

(Filed Jul. 23, 1996)

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted June 11, 1996
San Francisco, California

Before: REINHARDT and HALL, Circuit Judges, and MERHIGE, District Judge.**

Samuel A. Lewis, Director of the Arizona Department of Corrections, appeals the district court's denial of his motion for summary judgment on the basis of qualified immunity on Leslie Andrew Hanlon's 42 U.S.C. § 1983 complaint alleging an ex post facto violation regarding his sentence. We conclude that the district

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

court correctly denied defendant Lewis's assertion of qualified immunity, and affirm.

In 1988, plaintiff Leslie Hanlon was charged in Pinal County Superior Court with embezzlement. He entered into a plea agreement and, on July 25, 1988, was sentenced to a term of 5.25 years. His sentence expiration date was set at April 29, 1993.

Arizona state law provides an opportunity for parole-eligible prisoners to earn release credits. A prisoner's earned release credit date is the date when the sum of the release credits earned and actual time served equals the sentence imposed. In its decision denying the defendant's qualified immunity assertion, the trial court stated that Hanlon's earned release credit date was set at November 5, 1991.[1]

At the time of Hanlon's offense, Arizona law gave the director of the Arizona Department of Corrections (ADOC) authority, pursuant to rules promulgated by the ADOC, to release any prisoner on his earned release credit date.[2] At the time of Hanlon's offense, it was the

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[1] Defendant in his opening brief on appeal states that Hanlon's original earned credit release date was estimated to be January 5, 1992. We do not resolve this potential dispute as it in no way affects the decision on qualified immunity.

[2] A.R.S. § 41-1604.07(D) provides in pertinent part: "The director, according to rules promulgated by the department, may authorize the release of any prisoner who has earned release credits which, when added to the time served by the prisoner, equal the sentence imposed by the court which shall be the prisoner's earned release credit date."

practice of the department routinely to release prisoners on that date.

At the commencement of his custody, Hanlon was given an administrative classification profile. A classification profile consists of two parts: a "P" score reflecting the inmate's risk to the public; and an "I" score reflecting the inmate's institutional risk. Both scores range from one to five, with five representing the greatest risk. On March 8, 1990, after he was found guilty of three major rule violations, Hanlon's classification profile was raised to 5/5, the maximum in both categories. At the time of his conviction, and on March 8, 1990, an inmate's classification profile did not bear on his earned release credit date: neither official policy nor department practice linked them. Indeed, defendant Lewis concedes that throughout this time prisoners were routinely released on their earned release credit dates with classification profiles of 5/5.

On May 1, 1991, more than three years after the offense for which Hanlon was sentenced occurred and more than a year after his classification profile was raised to 5/5, the ADOC promulgated the Director's Management Order (DMO) 91-03. DMO 91-03 provided that in order to qualify for release at the earned release credit date, an inmate must have a correctional classification profile with a P factor of 3 or below, and an I factor of 4 or below. Under the order, those inmates who meet such a profile, whose underlying offense allows for earning release credits, and who have earned release credits, are automatically approved for release on their earned release credit dates; those who do not meet the required

profile are automatically denied earned release credit date release.

On August 19, 1991, Hanlon's status was reviewed for earned release eligibility, and he was deemed ineligible, pursuant to DMO 91-03, because his classification profile was too high. Hanlon was not released until his sentence expired on April 29, 1993.

Defendant Lewis is entitled to qualified immunity in a suit for civil damages insofar as his conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

We conclude that defendant Lewis's retroactive application of DMO 91-03 in this case violated a right sufficiently clearly established that a reasonable official would have understood that he was violating that right.

Article I of the Constitution provides that neither Congress nor any state shall pass any ex post facto law. U.S. Const. art. I, § 9, cl. 3, art. I, § 10, cl. 1. The Supreme Court has announced a two-prong test to determine whether the application of a penal law violates the ex post facto clause. "[F]irst, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.' " *Miller v. Florida*, 482 U.S. 423, 429 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

An ex post facto law is not simply one that makes criminal an act that was lawful at the time it was committed, or a law that increases a sentence following the commission of the act for which punishment is imposed. Rather, this court has held that "[t]he ex post facto provision applies to a wide range of changes affecting trial procedures and the mechanics of punishment." *U.S. v. Paskow*, 11 F.3d 873, 876 (9th Cir. 1993).

In *Flemming v. Oregon Bd. of Parole*, 998 F.2d 721 (9th Cir. 1993), the Ninth Circuit struck down as an ex post facto law an amended state parole regulation that merely reduced the "opportunity" for early release. The court relied on the reasoning of the leading Supreme Court cases, and particularly on *Weaver*, stating that "it is sufficient for ex post facto purposes if a statute significantly reduces an inmate's early release *opportunities*, regardless if such opportunities are contingent on the exercise of official discretion." *Id.* at 724 (emphasis in the original).

The regulation promulgated by defendant Lewis when retroactively applied to Hanlon similarly deprived him of the opportunity to reduce his time in prison. As the trial court noted in granting plaintiff Hanlon's motion for summary judgment on the issue of liability, "Before DMO 91-03, plaintiff was eligible for release on his earned release credit date, and after DMO 91-03 he was not."

Appellant Lewis relies on *Smith v. United States Parole Commission*, 875 F.2d 1361 (9th Cir. 1989) and *Wallace v. Christensen*, 802 F.2d 1539 (9th Cir. 1986), to argue that, because "[t]he ADOC Director retained at all times since 1986, the absolute discretion to regulate the earned credit

release of prison inmates," the prohibition against ex post facto laws does not attach. He contends that the fact that the Director had discretion to promulgate rules means that the DMO is not a "law" for the purposes of ex post facto analysis, but rather a "mere procedural guidepost without the characteristics of law." *Smith*, 875 F.2d at 1367. Lewis's reliance on *Smith* is misplaced.

The Supreme Court has held that retroactive application of a statute which mandates a punishment that had been discretionary at the time the crime was committed violates the ex post facto clause. *See Lindsey v. Washington*, 301 U.S. 397, 400-02 (1937). Thus, "Lindsey establishes 'that one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received was not more onerous than that which he might have received under the old.' " *Miller*, 482 U.S. at 432 (1987).

The "discretion" delegated to the ADOC Director under Arizona state law is not sufficient to render earned release credit date regulations mere "procedural guideposts without the characteristics of laws," in line with *Smith*. Rather, A.R.S. § 41-1604.07(D) delegates rulemaking authority to the ADOC to establish binding regulations for determining when a prisoner will be released on his earned release credit date. After DMO 91-03 was promulgated, the ADOC Director did not have discretion to "ignore" the directive "altogether as circumstances require," as the test set out in *Smith* requires. *Smith*, 875 F.2d at 1367.

Finally, Lewis's reliance on *Smith* is misplaced most clearly because in *Flemming*, this court, relying on well-

settled Supreme Court precedent – *Weaver, Miller,* and *Lindsey* – expressly limited *Smith* "to the context of federal parole guidelines and their related regulations." *Flemming,* 998 F.2d at 727. Lewis's contentions that the retroactive application of DMO 91-03 did not violate the ex post facto violation are without merit.

Lewis next argues that even if his decision to apply DMO 91-03 retroactively violated the prohibition against ex post facto laws, plaintiff Hanlon cannot establish that the 'contours' of his rights were 'sufficiently clear' that Lewis should have understood that his actions were unlawful. Lewis argues that the "mixed state of existing ex post facto analysis" entitles him to qualified immunity, even if a violation occurred. Lewis is only able to muster two cases to support his contention that Hanlon's rights were not clearly established.

In arguing for qualified immunity, Lewis argues that because the court's decision in *Flemming* to limit *Smith* expressly to its facts was not handed down until 1993, he was entitled to rely on *Smith* in 1991 when DMO 91-03 was promulgated. Such a contention is without merit. Lewis's reading of Smith was as implausible in 1991 as it is now. That *Flemming* was not decided until 1993 does not weaken its holding that prior Supreme Court precedent limited *Smith*: in *Flemming,* the court merely made explicit what was clear in the light of overwhelming Supreme Court precedent.

Lewis also relies heavily on the fact that the Arizona Court of Appeals, in considering the same issue raised in this case, found no ex post facto violation. *Sanchez v.*

Ryan, 178 Ariz. 88, 870 P.2d 1184 (App. 1993). This argument is more persuasive, however it is not dispositive. The *Sanchez* case was decided after *Flemming*, yet it fails to cite *Flemming*, or any other relevant Ninth Circuit or Supreme Court ex post facto decisions, with the single exception of *Weaver*, in concluding that no ex post facto violation occurred. That a court joined Lewis in his obvious error, does not convert the disregard of existing law into a reasonable mistake. Lewis is not entitled to qualified immunity simply by relying on a state ruling that failed to consider controlling precedent.

We conclude that, in light of *Lindsey*, *Weaver*, and *Miller*, Lewis's decision to retroactively apply the provisions of DMO 91-03 violated a clearly established constitutional right of which a reasonable person would have known. Accordingly, we affirm the district court's denial of qualified immunity.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

LESLIE ANDREW HANLON, Plaintiff, v. SAMUEL LEWIS, Defendant.	CIV 92 – 1506 PHX EHC **ORDER** (Filed Mar. 24, 1995)

Plaintiff's original Complaint was filed on August 10, 1992, while he was confined in the Arizona State prison Complex at Florence (ASPC-F). A Second Amended Complaint was filed on December 2, 1993. Plaintiff was released from custody on April 29, 1993.

Plaintiff alleges in his Complaint that the retroactive application of Director Management Order (DMO) 91-03 made him ineligible for release on his earned release credit date, in violation of the *Ex Post Facto* Clause of the United States Constitution. Plaintiff also alleged violations of his constitutional rights to due process and equal protection.

On September 27, 1994, this Court entered an Order ruling on the parties' Cross-Motions for Summary Judgment on the *ex post facto* claim. The Court granted the plaintiff's motion and denied the defendant's motion, ruling that the defendant's retroactive application of DMO 91-03 violated the *Ex Post Facto* Clause (dkt. 94). The Court did not rule on the issue of damages and did not address the plaintiff's due process and equal protection claims.

Defendant raised qualified immunity as a defense in his Answer to the Second Amended Complaint (dkt. 49). After the Court ruled on the summary judgment motions, the defendant filed a second Motion for Summary Judgment, arguing that the *ex post facto* claim should be dismissed on grounds of qualified immunity. The sole question for the Court is whether the defendant is shielded from liability in connection with the plaintiff's *ex post facto* claim by the doctrine of qualified immunity. The motion is fully briefed and ready for disposition without oral argument.

I. Background

The relevant facts are more extensively set forth in the Court's September, 1994 Order. The statutory background is described in that Order and in the state court of appeals decision in *Sanchez v. Ryan*, 178 Ariz. 88, 870 P.2d 1184 (App. 1993), (review denied, April 19, 1994), which addressed an identical *ex post facto* claim.

A.R.S. §41-1604.07(A)(1) entitles prisoners classified as parole eligible, class one to earn release credits. Prior to 1986, A.R.S. §41.1604.07(B) provided that release credits would be deducted from and would thus reduce the term of imprisonment imposed. Prisoners were automatically released on the date that their release credits, when added to the time that they had served, equaled the sentence imposed.

In 1986, §41-1604.07(B) was amended to provide that release credits would no longer reduce the term of imprisonment imposed. New subsection §41.1604.07(D), however, provided that

> The Director, according to rules promulgated by the department, may authorize the release of any prisoner who has earned release credits which, when added to the time served by the prisoner, equal the sentence imposed by the court which shall be the prisoner's earned release credit date.

DMO 91-03, promulgated on May 1, 1991, provided that earned release would be available only to prisoners who met certain criteria and who were granted release by the director. Significant for purposes of this motion is the DMO's requirement that a prisoner must have a public risk factor of 3 or below and an institutional risk factor of 4 or below to be eligible for earned release.[1] The court of appeals noted in *Sanchez* that at the hearing on the petition for writ of habeas corpus in Superior Court,

> counsel for the state admitted that before DMO 91-03 became effective, ADOC's practice was to release prisoners on their earned release credit dates even if their public risk factor was greater than 3.

Sanchez, 178 Ariz. at 90.

The plaintiff was charged with embezzlement in Pinal County Superior Court in 1988. He entered a plea agreement and was sentenced to 5.25 years on July 25, 1988. Plaintiff's earned release credit date was November 5, 1991; Plaintiff's sentence expiration date was April 29, 1993.

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[1] A classification profile consists of two parts: (1) a "P" score reflecting risk to the public and (2) an "I" score reflecting institutional risk. The scores range from one to five; five represents the highest risk.

On March 8, 1990, the plaintiff's administrative classification profile was raised to 5/5.[2] On August 19, 1991, the plaintiff was reviewed by the Institution Classification staff for earned release eligibility. Pursuant to DMO 91-03, the plaintiff was deemed ineligible for earned release because his classification profile was too high. The Court found in its previous order that the implementation of DMO 91-03 "effectively deprived plaintiff of his earned release credits." Order at 4 (dkt. 94).

II. Discussion

Defendant is entitled to qualified immunity unless the conduct at issue violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The question is not whether the very action in question has been held unlawful. *Id.*, 483 U.S. at 640, 107 S.Ct. at 3039. An action violates clearly established law when, in view of the pre-existing law, the unlawfulness of the action is apparent. *Id.*

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[2] As noted in the previous Order, the record is unclear as to Plaintiff's initial classification profile. The defendant has described the plaintiff as having a "checkered disciplinary history while at ADOC."

Contrary to the defendant's argument, it is not dispositive that no federal court has previously addressed the precise issue whether these earned release eligibility guidelines violate the *Ex Post Facto* Clause. Nor is it dispositive that the Arizona Court of Appeals found no *ex post facto* violation in the *Sanchez* case. The Court's September, 1994 ruling relied primarily on Supreme Court precedent that was well established in 1991, when the DMO was implemented. In particular, the Court relied on *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) and *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

Defendant relies in his qualified immunity motion on the argument that DMO 91-03 did not change Arizona law because – prior to its implementation – no statute, rule, or regulation *required* the director to release an inmate when he reached his earned release credit date. The director had discretion to do so and, apparently, it was the practice to do so even when the public risk factor exceeded 3. This argument was the basis for the court of appeals decision in *Sanchez*. That court found that at the time in question – before the enactment of the DMO – the director *could* release inmates who reached their earned release credit dates. However,

> no statute, rule, or regulation *required* the director to release all prisoners who had reached their earned release credit dates, and . . . the director's *practice* of doing so did not have the force and effect of law.

178 Ariz. at 91. The court of appeals concluded that "Because DMO 91-03 did not represent a change in the law that existed when appellee committed his offense, it

did not violate the constitutional prohibitions against ex post facto laws." *Id.*

This Court, however, reached a different conclusion in its September 27, 1994 order, finding that it was immaterial that the defendant was not required to release the plaintiff on his earned release credit date. Again, this Court relied primarily on the Supreme Court's 1981 decision in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

As the Ninth Circuit has noted, "Several passages in *Weaver* indicate that it is sufficient for ex post facto purposes if a statute significantly reduces an inmate's early release *opportunities*, regardless if such opportunities are contingent on the exercise of official discretion." *Flemming v. Oregon Board of Parole*, 998 F.2d 721, 724 (9th Cir. 1993). Specifically, in *Weaver*, the Supreme Court held that retroactive application of a statute changing the formula for deducting gain-time credits from a sentence violated the *Ex Post Facto* Clause, in spite of the fact that the gain-time allowance could be withdrawn, modified, or denied.

> Contrary to the reasoning of the Supreme Court of Florida, a law need not impair a "vested right" to violate the *ex post facto* prohibition. Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements . . . The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition . . . Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both

> retrospective and more onerous than the law in effect on the date of the offense.

101 S.Ct. at 964-965.

The Ninth Circuit also noted in *Flemming* that the Supreme Court held in *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937) that one is not barred from challenging new law on *ex post facto* grounds simply because the sentence under the new law is not necessarily more onerous than that which would have been imposed previously. 998 F.2d at 725. "This holding leaves open the door to claims of ex post facto violations arising from laws with discretionary elements." *Id.*

In light of *Weaver* and *Lindsey*, a reasonable official should have been aware in 1991 that the application of DMO 91-03 to the plaintiff could violate the *Ex Post Facto* Clause. The Court concludes that Defendant Lewis is not shielded by qualified immunity.

III. Conclusion

Accordingly, for the reasons previously set forth,

IT IS ORDERED denying Defendant's Motion for Summary Judgment on Qualified Immunity (dkt. 97).

IT IS FURTHER ORDERED granting Plaintiff's Cross-Motion for Summary Judgment on Qualified Immunity (dkt. 114).

IT IS FURTHER ORDERED setting a pretrial conference in this matter on Monday, April 17, 1995 at 9:00 a.m.

DATED this 22 day of March, 1995.

/s/ Earl H. Carroll
Earl H. Carroll
United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LESLIE ANDREW HANLON, Plaintiff, v. SAMUEL LEWIS, Defendant.	CIV 92-1506 PHX EHC ORDER (Filed Sep. 27, 1994)

Introduction

On August 10, 1992, while confined in the Arizona State Prison Complex at Florence, Arizona, plaintiff filed a *pro se* complaint pursuant to 42 U.S.C. § 1983. Plaintiff filed an amended complaint on September 16, 1992 and a second amended complaint on December 2, 1993.

Plaintiff alleges that the retroactive application of Director Management Order (DMO) 91-03 made plaintiff ineligible for release on his earned credit release date,[1] in violation of the *Ex Post Facto* Clause of the United States Constitution. Plaintiff further alleges that the retroactive application of DMO 91-03 deprived plaintiff of a liberty interest in his early release from custody without due process or equal protection of law under the Fourteenth Amendment.

Named as defendant is Arizona Department of Corrections Director Samuel Lewis. Plaintiff seeks monetary

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[1] *see infra*, note 3.

and injunctive relief. Neither party has requested a jury trial.

On October 1, 1992, the Court stayed the action to permit plaintiff to pursue his state court remedies and, if necessary, his federal remedies pursuant to a writ of habeas corpus.

On April 29, 1993, plaintiff was unconditionally released from prison and, on October 28, 1993, the stay was vacated and defendant was directed to respond to the complaint.[2]

Currently pending before the Court are the following motions: defendant's motion for summary judgment (dkt. 62); plaintiff's motion for summary judgment (dkt. 71); plaintiff's motion to print Court's opinion (dkt. 72); plaintiff's motion for the Court to review the legal arguments in his amended complaint (dkt. 73); plaintiff's motion for judgment (dkt 82); plaintiff's response and objection to the Magistrate Judge's order filed March 17, 1994 (dkt 83); and plaintiff's motion for the Court to review a state court decision (dkt. 85).

Motions for Summary Judgment

The relevant facts of this case are not subject to any meaningful dispute:

In January, 1988, plaintiff was charged in Pinal County Superior Court with the crime of embezzlement. Plaintiff entered into a plea agreement and, on July 25,

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[2] Because plaintiff has been released from custody, his claims for injunctive relief are now moot.

1988, was sentenced to the custody of the Arizona Department of Corrections (ADOC) for a term of 5.25 years. Plaintiff's earned release credit date was set at November 5, 1991 and plaintiff's sentence expiration date was set at April 29, 1993.[3] Plaintiff's Exhibit F.

At the commencement of his custody, plaintiff was given an administrative classification profile. A classification profile consists of two parts: first, a "P" score reflecting plaintiff's risk to the public; and second, an "I" score reflecting plaintiff's institutional risk. These scores range from one to five, with five representing the greatest risk.

Plaintiff's initial classification profile does not appear in the record before the Court. However, plaintiff had what defendant alleges as a "checkered disciplinary history while with ADOC." Defendant's Statement of Facts at ¶ 3. On March 8, 1990, after he was found guilty of three major rule violations, plaintiff's classification profile was raised to 5/5.[4]

On May 1, 1991, more than three years after plaintiff was sentenced and nearly a year after plaintiff's classification profile was raised to 5/5, defendant promulgated DMO 91-03. *See* Defendant's Exhibit B. DMO 91-03 provided, *inter alia*, that in order to qualify for release at the

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[3] As will be more fully examined below, pursuant to A.R.S. § 41-1604.07, the earned release credit date is the date when the sum of release credits earned and actual time served (including credit for presentence incarceration) equals the sentence imposed.

[4] Plaintiff contends that one of the alleged violations was dismissed on appeal. Plaintiff's Exhibit K.

earned release credit date, an inmate must have a correctional classification profile with a P factor of 3 or below, and an I factor of 4 or below. Inmates who meet such a profile, whose underlying offense allows for earning release credits, and who have earned the release credits, *shall* be approved for earned release credit date release. DMO 91-03 at sec. 5.1.[5]

On August 19, 1991, plaintiff was reviewed by the Institution Classification staff for earned release eligibility. Plaintiff was deemed ineligible for earned release because, pursuant to DMO 91-03, his classification profile was too high.

In accordance with the ADOC Offender Classification System, at least four years are required to reduce an inmate's P score from a 5 to a 3 (i.e. a qualifying P level under 91-03). *See* Plaintiff's Exhibit M at p. 38. With a sentence expiration date of April 29, 1993, the implementation of DMO 91-03 effectively deprived plaintiff of his earned release credits because he would not have become

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[5] Effective June 24, 1992, DMO 91-03 was amended and the following passage was added to sec. 1.0:

> The Director retains the absolute discretion to modify this Order, as necessary, or to ignore it altogether as circumstances require. Such override may be made in the Director's sole and absolute discretion when needed to promote institutional safety and security or to account for other unique concerns. This Order is not a binding constraint on the Director's administrative decision-making process, but merely serves as a guide to the Director's proper exercise of his sole discretion.

See Plaintiff's Exhibit B.

eligible for earned release, assuming good behavior, until 1995.

Ex Post Facto Claim

Plaintiff alleges that defendant's application of DMO 91-03 violated the *Ex Post Facto* Clause of the Constitution.

Article I, section 10 of the Constitution prohibits the states from passing laws *ex post facto*:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 2719 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68 (1925). In Arizona, administrative rules and regulations may have the force and effect of law and be subject to the *ex post facto* prohibition. *See Arnold v. Arizona Board of Pardons and Paroles*, 167 Ariz. 155, 158, 805 P.2d 388, 391 (App. 1991).

In support of his motion for summary judgment, defendant Lewis refers the Court to *Sanchez v. Ryan*, 870 P.2d 1184 (Ariz.App. 1993) (*rev. denied* April 19, 1994), an Arizona Court of Appeals opinion that addresses the identical issues presently before the Court. Defendant

argues that *Sanchez* is dispositive and that the Court should summarily dismiss plaintiff's amended complaint. Defendant's motion is otherwise lacking legal analysis.

The following passage in *Sanchez* sets forth the statutory history of the Arizona statute governing earned release credits:

> Prior to 1986, A.R.S. section 41-1604.07(B) provided that release credits would be deducted from and reduce the term of imprisonment imposed. Pursuant to this statute, prisoners were automatically released on the date that their release credits, when added to the time that they had served, equaled the sentence imposed. This release date was then known as the 'sentence expiration' date.
>
> The legislature amended section 41-1604.07(B) in 1986 to provide that release credits would no longer reduce the term of imprisonment imposed.[6] 1986 Ariz. Sess. Laws, ch. 200, § 2. At the same time, it added subsection (D) to the statute. *Id.* Subsection (D) provides that the director of ADOC, pursuant to rules that ADOC has promulgated, *may* authorize the release of any prisoner on the date that his release credits, when added to the time

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[6] As amended, A.R.S. section 41-1604.07(B) provides as follows:

> Release credits earned by a prisoner pursuant to subsection A of this section shall not reduce the term of imprisonment imposed by the court on such prisoner nor reduce the sentence imposed on the prisoner for the purpose of determining such prisoner's parole eligibility.

> served, equal the sentence imposed.[7] This date is now known as the earned release credit date. *See* A.R.S. § 41-1604.07(D).

870 P.2d at 1185-86 (emphasis in original) (footnotes in original).

In this case, as in *Sanchez*, at the time plaintiff committed his offense, the only rule ADOC had promulgated concerning earned credit release, as authorized by section 41.1604.07(D), was Internal Management Procedure (IMP) 424.[8] IMP 424 set forth the procedure for the forfeiture and possible restoration of earned release credits.[9] According to ADOC's counsel in *Sanchez*, "the director had a practice of treating earned release credits as though they reduced the term of imprisonment imposed even

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[7] As amended, A.R.S. § 41-1604.07(D) provides in pertinent part as follows:

> The Director, according to rules promulgated by the department, may authorize the release of any prisoner who has earned release credits which, when added to the time served by the prisoner, equal the sentence imposed by the court which shall be the prisoner's earned release credit date.

[8] IMP 424 was superseded by IMP 503.1 on February 27, 1991.

[9] IMP 424(I)(D) provides as follows:

> In cases of institutionalized inmates involving major violations, a finding of guilty by the Disciplinary Committee may result in the recommendation for the forfeiture of earned release credits. These recommendations shall be submitted through the Institution Classification Committee, the Chief Executive Officer, and the Deputy Director, Adult Services, to the Director who may approve or deny the request at his sole discretion.

though section 41-1604.07(B) had been amended to provide that they would no longer so do." *Id.* at 1186.

Section 41-1604.07(C) provides that the director may declare any and all earned release credits forfeited upon reclassification of a prisoner resulting from a failure to adhere to the rules and regulation of the department, or failure to demonstrate a continual willingness to volunteer for or successfully participate in a work, educational, treatment or training program. In the discretion of the director, the forfeited release credits may be subsequently restored.

In this case, however, plaintiff's earned release credits were not forfeited following his disciplinary proceedings and corresponding security profile reclassification. On March 2, 1993, plaintiff had accrued 541 days of earned release credits. Plaintiff's Exhibit D.

Returning to *Sanchez*, the Court of Appeals concluded as follows:

> On appeal, the state argues that DMO 91-03 did not implicate ex post facto concerns because it did not represent a change in the law that existed when appellee committed his offense. It notes that at the time in question, section 41-1604.07(D) provided that the director, in accordance with rules promulgated by ADOC, could release prisoners who had reached their earned release credit dates. It contends that no statute, rule, or regulation *required* the director to release all prisoners who had reached their earned release credit dates and that the director's *practice* of doing so did not have the force and effect of law. We agree.

> Appellee has not cited any statute, rule, or regulation that was in effect at the time he committed his offense that *required* the director to release him when he reached his earned release credit date . . . Because DMO 91-03 did not represent a change in the law that existed when appellee committed his offense, it did not violate the constitutional prohibitions against ex post facto laws.

870 P.2d at 1187 (Emphasis in original).

Argument

As an initial matter, the Court rejects defendant's argument that *Sanchez* is dispositive and, under the principles of federalism and comity, plaintiff's amended complaint must be disposed of summarily. To be sure, this Court must defer to the state courts on the construction of their laws, but this case involves more than the construction of the state statutes and regulations at issue; rather, it requires consideration of the Federal Constitution, and the inquiry does not call for any special degree of deference to the state courts. *Morales v. California Dep't of Corrections*, 16 F.3d 1001, n.5 (9th Cir. 1994) (*ex post facto* challenge to statutory change in the frequency of parole eligibility hearings).

As outlined above, the *Sanchez* decision rests on the ground that plaintiff had not cited any statute, rule or regulation in effect at the time he committed the offense that *required* defendant to release plaintiff when he reached his earned credit release date.

The *Ex Post Facto* Clause prohibits laws which "make more burdensome the punishment for a crime, after its

commission." *Collins v. Youngblood*, 497 U.S. at 42, 110 S.Ct. at 2724. That defendant was not *required* to release plaintiff on his earned credit release date is immaterial: it is "sufficient that [plaintiff's] 'opportunity to shorten his time in prison' was reduced by the statute in question." *Flemming v. Oregon Bd. of Parole* 998 F.2d 721, 724-25 (9th Cir. 1993) (quoting *Weaver v. Graham*, 450 U.S. 24, 34, 101 S.Ct. 960, 967 (1981)):

> [T]he Supreme Court has repeatedly stated that a criminal defendant need not show that she or he certainly would have received a less onerous punishment under a prior law to establish a constitutional violation. Stated another way, 'a law need not impair a 'vested right' to violate the *ex post facto* prohibition.'

Id. at 726 (quoting *Weaver*, 450 U.S. at 29, 101 S.Ct. at 964).

In *Weaver*, the Supreme Court considered an amendment to a Florida statute that reduced the amount of "gain time" an inmate could automatically earn. 450 U.S. at 25, 101 S.Ct. at 962.[10] The Court set forth two critical elements that must be present for a criminal or penal law to be *ex post facto*: "it must be retrospective, that is it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 29, 101 S.Ct. at 964. *See also Flemming*, 998 F.2d at 723.

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[10] Fla.Stat. § 944.275(1)(1979) enacted a new formula for monthly gain-time deductions. For instance, under the prior statute inmates could gain five days per month off for good behavior during the first two years of their sentence; whereas under the revised statute only three days per month could be gained. *Id.* at 963.

As to the first element, the Court held that "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date." *Id.* at 32, 101 S.Ct. at 965. The Court answered this question in the affirmative: "For prisoners who committed crimes before its enactment, [the statute] substantially alters the consequences attached to a crime already completed, and therefore changes the 'quantum of punishment.' " *Id.* at 33, 101 S.Ct. at 966 (quoting *Dobbert v. Florida*, 432 U.S. 282, 293-94, 97 S.Ct. 2290, 2298 (1977)).

As to the second element, the Court held that plaintiff is disadvantaged by the reduced opportunity to shorten his time in prison: "By definition, this reduction in gain-time accumulation lengthens the period that someone in [plaintiff's] position must spend in prison." *Id.* at 24, 101 S.Ct. at 967.

The *Weaver* Court found the statute at issue void as applied to plaintiff, reversing the judgment of the Supreme Court of Florida and remanding the case for further proceedings. *Id.* at 37, 101 S.Ct. at 968.

In *Weaver*, the Supreme Court relied on *Greenfield v. Scafati*, 277 F.Supp. 644 (D.Mass. 1967) (three-judge court), *summarily aff'd* 390 U.S. 713, 88 S.Ct. 1409. *Weaver*, 450 U.S. at 35, 101 S.Ct. at 967; *see also id.* at 38, 101 S.Ct. at 969 (Blackmun, J. concurring in judgment). In that case, a three-judge court considered the following amendment to a Massachusetts statute concerning good conduct deductions:

> A prisoner released on parole by the parole board, who has failed to observe all the rules of

> his parole and has been returned to a correctional institution for the violation of his parole, shall not receive deductions described in this section [for good conduct] for any of the first six months after he is returned to the correctional institution.

277 F.Supp at 645. The plaintiff in *Greenfield* was sentenced before the effective date of the amendment, and was paroled after the effective date. *Id.* Upon his violation of parole and return to prison, the statute was invoked. *Id.*

The *Greenfield* Court concluded that plaintiff was disadvantaged by the new restrictions on eligibility for release. *Id.* at 646. Moreover, the Court found "no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for, and hence earn, parole. Each . . . materially 'alters the situation of the accused to his disadvantage.' " *Id.* (quoting *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 387 (1890).

In his reply in support of summary judgment, defendant cites *Smith v. Parole Comm'n*, 875 F.2d 1361 (9th Cir. 1989). In *Smith*, the Ninth Circuit held that application of a revised federal parole regulation did not violate the *Ex Post Facto* Clause because it was not a "law" for *ex post facto* purposes. 875 F.2d at 1367-68. In *Flemming v. Oregon Bd. of Parole*, the Ninth Circuit, relying on *Miller v. Florida*, 482 U.S. 435, 107 S.Ct. 2446 (1987), explicitly limited *Smith* to the context of federal parole guidelines and their related regulations. 998 F.2d at 727.

> Our decision in *Smith* is distinguishable from the present case for reasons outlined by the Supreme Court in *Miller v. Florida* . . . First,

> in contrast to cases which "have held that the federal parole guidelines are not 'laws' for purposes of the *Ex Post Facto* Clause," Florida regards its sentencing guidelines as having "the force and effect of law." Second, the *Miller* Court indicated that the Florida sentencing guidelines do not "simply provide flexible 'guideposts' for use in the exercise of discretion: instead, they create a high hurdle that must be cleared before discretion can be exercised." Finally, "the revised [sentencing] guidelines directly and adversely affect the sentence petitioner receives.

Id. at 725 (interior citations omitted).

Applying the *Miller* analysis to the DMO at issue in the instant case, the Court must consider the following questions: (1) does Arizona regard its prison regulations to have the force and effect of law; (2) does the regulation at issue simply provide a flexible guidepost for use in the exercise of discretion, or does it create a barrier that must be cleared before discretion can be exercised; and (3) does the regulation at issue directly and adversely affect the sentence plaintiff received.

In *Sanchez v. Ryan,* the Arizona Court of Appeals concluded that "[a]dministrative rules and regulations may have the force and effect of law, *Herzberg v. David*, 27 Ariz. App. 418, 420, 555 P.2d 677, 679 (App. 1976), and therefore may be subject to the ex post facto prohibition." 870 P.2d at 1187. The *Sanchez* Court cited *Arnold v. Arizona Board of Pardons and Paroles*, 167 Ariz. 155, 158, 805 P.2d 388, 391 (App. 1991). In that case, involving a regulation relating to commutation applications, the court wrote:

> Appellants argue that the ex post facto clause applies to administrative regulations that are

> adopted pursuant to statute, in this case, A.R.S. § 31-401(F). The board does not dispute that fact, and neither do we.

Arnold, 805 P.2d at 391. In this case, DMO 91-03 was adopted pursuant to A.R.S. § 41-1604.07(D). Accordingly, the first prong of the *Miller* test is satisfied.

Second, under DMO 91-03 a prisoner must have a P score of less than 4 and an I score of less than 5 in order to be considered eligible for earned release. Thus, the prison regulation at issue creates a high hurdle that must be cleared before official discretion can be exercised.

Lastly, at the time plaintiff committed the offense, an inmate was eligible for release on the date that the sum of his earned time credits and his actual time served equaled the term of his sentence. After the implementation of DMO 91-03, an inmate was eligible for release on the date that the sum of his earned time credits and his actual time served equaled the term of his sentence, *but only if the inmate has a P score of less than 4 and an I score of less than 5*. Before DMO 91-03, plaintiff was eligible for release on his earned credit release date, and after DMO 91-03 he was not. DMO 91-03 applied to events occurring before its implementation and directly and adversely effected the length of plaintiff's confinement.[11]

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[11] Because of the Court's conclusion, the Court need not address plaintiff's due process or equal protection claims. The Court notes, however, that these claims were not raised or argued in either party's motion for summary judgment.

In addition, in his motion for summary judgment, plaintiff argues that this Court must determine defendant's claim of qualified immunity pursuant to *Anderson v. Creighton*, 483 U.S.

For the foregoing reasons, the Court concludes that DMO 9103, as applied to plaintiff, violated plaintiff's rights arising from *Ex Post Facto* Clause of the United States Constitution. There are no material issues of fact in dispute and plaintiff is entitled to judgment as a matter of law.

ACCORDINGLY,

IT IS ORDERED denying defendant's motion for summary judgment (dkt. 62).

IT IS FURTHER ORDERED granting plaintiff's motion for summary judgment (dkt. 71).

IT IS FURTHER ORDERED denying plaintiff's motion to print Court's opinion (dkt. 72).

IT IS FURTHER ORDERED denying as moot plaintiff's motion for the Court to review the legal arguments in his amended complaint (dkt. 73)

IT IS FURTHER ORDERED denying plaintiff's motion for judgment (dkt 82).

635, 107 S.Ct. 3034 (1987). *Anderson* stands for the proposition that qualified immunity is applicable when a reasonable officer could have believed his actions to be lawful in light of clearly established law. 483 U.S. at 642, 107 S.Ct. at 3040.

Defendant does not respond to plaintiff's assertion.

Qualified immunity is an affirmative defense, *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 2736 (1982), and the burden of proving the defense lies with the official asserting it. *Id.* at 819, 102 S.Ct. at 2738.

IT IS FURTHER ORDERED denying plaintiff's objections to the Magistrate Judge's order filed March 17, 1994 (dkt 83).

IT IS FURTHER ORDERED denying as moot plaintiff's motion for the Court to review a state court decision (dkt. 85).

IT IS FURTHER ORDERED setting a preliminary pretrial conference on Monday, October 31, 1994 at 9:30 a.m. to discuss further proceedings in this matter.

DATED this 26 day of September, 1994.

/s/ Earl H Carroll
Earl H. Carroll
United States
District Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESLIE ANDREW HANLON, Plaintiff-Appellee, v. SAMUEL A. LEWIS, Defendant-Appellant.	No. 95-15869 D.C. No. CIV 92-1506 PHX EHC ORDER (Filed Sep. 6, 1996)

Before: REINHARDT and HALL, Circuit Judges, and MERHIGE, District Judge.*

The panel has voted to deny appellee's petition for rehearing. Judges Hall and Reinhardt have voted to reject the suggestion for rehearing en banc and Judge Merhige so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX E

§ 41-1604.07. Earned release credits; forfeiture; restoration

A. Each prisoner classified as parole eligible, class one, pursuant to § 41-1604.06, shall be allowed the following release credits:

1. If sentenced upon a first conviction other than pursuant to § 13-703 or other than for a felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another, every two days served within class one shall be counted as an earned release credit of one day.

2. If sentenced pursuant to the provisions of § 13-604, subsection A, or upon first conviction of a class 4, 5 or 6 felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury or any other provision of law which prohibits release on any basis until serving not less than one-half the sentence imposed by the court, every two days served within class one shall be counted as an earned release credit of one day.

3. If sentenced according to any other of the provisions of § 13-604 or any other provision of law which prohibits release on any basis until serving not less than two-thirds the sentence imposed by the court, every three days served within class one shall be counted as an earned release credit of one day.

B. Release credits earned by a prisoner pursuant to subsection A of this section shall not reduce the term of imprisonment imposed by the court on such prisoner, nor

reduce the sentence imposed on the prisoner for the purpose of determining such prisoner's parole eligibility.

C. Upon reclassification of a prisoner resulting from such prisoner's failure to adhere to the rules and regulations of the department or failure to demonstrate a continual willingness to volunteer for or successfully participate in a work, educational, treatment or training program, the director may declare any and all release credits earned by the prisoner forfeited. In the discretion of the director such release credits may subsequently be restored. The director shall maintain an account of release credits earned by each prisoner.

D. The director, according to rules promulgated by the department, may authorize the release of any prisoner who has earned release credits which, when added to the time served by the prisoner, equal the sentence imposed by the court which shall be the prisoner's earned release credit date. A prisoner on earned release credit release is not under the control of the department and the department is not required to provide parole services or otherwise supervise any prisoner released, except that the department may revoke the release of the prisoner until the final expiration of his sentence if the department has reason to believe that the released prisoner has engaged in criminal conduct during the term of his release.

Added by Laws 1978, Ch. 165, § 18, eff. Oct. 1, 1978. Amended by Laws 1980, Ch. 229, § 45, eff. April 23, 1980; Laws 1986, Ch. 200 § 2.

APPENDIX F

ARIZONA DEPARTMENT OF CORRECTIONS

DIRECTOR'S MANAGEMENT ORDER 91-03

SUBJECT: EFFECTIVE:
Earned Release Credit Date May 1, 1991
OPR: A1 SUPERSEDES: N/A DISTRIBUTION: A

*1.0 *PURPOSE*: To insure that inmates approved for an Earned Release Credit Date release meet Department and statutory criteria. The Director retains the absolute Discretion to modify this Order, as necessary, or to ignore it altogether as circumstances require. Such override may be made in the Director's sole and absolute discretion when needed to promote institutional safety and security to account for other unique concerns. This order is not a binding constraint on the Director's administrative decision-making process, but merely serves as a guide to the Director's proper exercise of his sole discretion.

2.0 *AUTHORITY*:

A.R.S. 41-1604, Duties and Powers of the Director.

A.R.S. 41-1604.07, Earned Release Credits; Forfeiture; Restoration.

A.R.S. 31-414, Absolute Discharge of Parolee; Effect; Notice to Victim.

3.0 *APPLICABILITY*: This policy is applicable to inmates eligible for Earned Release Credit Date release as defined by Arizona Revised Statute and staff responsible for preparation of inmate cases for release.

4.0 *DEFINITIONS*:

4.1 Committing Offense – The offense for which the inmate was convicted.

4.2 Correctional Classification Profile (CCP) – The summary of a series of factors and ratings used in the inmate classification system.

4.3 Earned Release Credit Date (ERCD) – Pursuant to A.R.S. 41-1604.07, the date when release credits earned and actual time served (includes credit for presentence incarceration), equal the sentence imposed. This release only applies to offenses committed on or after August 13, 1986 for inmates who meet criteria and is granted by the Director.

5.0 *THE ORDER:*

5.1 Eligibility Requirements – Inmates with date of offense on or after August 13, 1986, who meet the following criteria shall be approved for Earned Release Credit Date release:

5.1.1 Inmates must have a Correctional Classification Profile with a Public Risk factor of 3 or below and an Institutional Risk factor of 4 or below.

5.1.2 The committing offense must allow for earning release credits; and

5.1.3 The inmate must earn the release credits.

5.1.4 Special categories of inmates eligible for Earned Release Credit Date consideration are:

5.1.4.1 Inmates not eligible for provisional release due to the length of sentence or who become eligible for provisional release and earned release credit date at the same time due to the length of sentence.

5.1.4.1.1 Inmates who are denied a provisional release due to an Institutional Risk Factor rating of 4.

5.1.4.2 Inmates who receive sentence modification and become immediately eligible for an earned release credit date.

5.2 Ineligible for Earned Release Credit Date Release – The following categories of inmates shall be ineligible for Earned Release Credit Date release:

5.2.1 Inmates whose committing offense occurred *prior* to August 13, 1986.

5.2.2 Inmates with Public Risk Score of 4 or above or an Institutional Risk Score of 5 as a result of the Institutional Classification and Central Office Classification review.

5.2.3 Inmates who are *not* eligible for provisional release due to a Public Risk Score of 4 or above or an Institutional Risk Score of 5 as a result of the Institutional Classification and Central Office Classification review. (See ADC Policy #303.10, Provisional Release.)

5.2.4 Inmates who are denied Earned Release Credit Date release by the Administrator of the Offender Services Bureau, when it is determined that such denial is in the best interests of the public's health, safety, or welfare. The denial, with stated reasons, shall be provided to the inmate.

5.3 New Commitments to the Department – Within 20 workdays of the inmate's commitment to the Department, the Time Computation Unit of the Offender Services Bureau shall project the Earned Release Credit Date for those inmates earning release credits who are not eligible for provisional release due to sentencing or statute.

5.3.1 When an inmate who is eligible for an Earned Release Credit Date enters the Reception Center, the Institution Classification Committee shall complete the Institutional Endorsement Form, ADC Form #70501069, at the time of the inmate's *initial* classification. The Institutional Classification Committee shall submit the completed form to Central Classification for processing.

5.4 All Inmates Who Meet Criteria – The inmate's assigned Correctional Program Officer (CPO) or concurrent custody case manager shall complete the Institutional Endorsement Form for all inmates who meet the criteria outlined in Section 5.1.4.1 and 5.1.4.2.

5.4.1 The Classification and Parole Supervisor (CPS) of each institution shall ensure the Institutional Endorsement Form is completed at each level and the inmate is notified if determined to be ineligible.

5.4.2 The completed form shall be submitted to the Institutional Classification Committee.

5.4.3 The Institutional Classification Committee shall update each eligible inmate's

Correctional Classification Profile 150 days prior to the release eligibility date and shall submit the Institutional Endorsement Form to Central Classification for processing.

5.4.3.1. An inmate determined not eligible for Earned Release Credit Date release shall remain in institutional status until the inmate's sentence expiration date, unless released by other means.

5.4.4. Within thirty days of Central Classification's receipt of the Institutional Endorsement Form, the Administrator, Offender Services Bureau, shall ensure that:

5.4.4.1 Central Classification verifies the updated CCP and endorses or denies the Earned Release Credit Date release.

5.4.4.2 Central Classification forwards the Institutional Endorsement Form to the Time Computation Unit.

5.4.4.3 If approved, the Time Computation Unit verifies the release eligibility dates, annotates the AIMS DTO8 screen indicating final release confirmation and forwards a copy of the completed institutional Endorsement Form to the institution.

5.4.4.4 If denied, the Time Computation Unit recalculates the

inmate's release dates, notifies the institution and sends a copy of the completed Institutional Endorsement to the institution.

5.5 Inmates Who Do Not Meet Provisional Release Criteria – Inmates reviewed for provisional release who do not meet criteria shall also be reviewed for Earned Release Credit Date eligibility.

5.5.1 The Institutional Classification Committee and Central Office Classification shall enter on the Institutional Endorsement Form if the inmate is eligible for Earned Release Credit Date release. No further review is required at that time to determine eligibility.

5.6 Subsequent Eligibility After The 150-day Administrative Review – If a normal reclassification occurs after the 150-day administrative review which subsequently deems the inmate eligible for Earned Release Credit Date release, the inmate shall be determined to be eligible up to 30 days before the Earned Release Credit Date.

5.6.1 The Institution Classification Committee shall complete the required sections of a new Institutional Endorsement Form within two workdays and forward it to Central Classification. The eligibility shall be noted as a subsequent reclassification in the Comments section.

5.6.2 Central Classification shall verify the updated CCP and forward it to the Time Computation Unit.

5.6.3 The Time Computation Unit shall process the Institutional Endorsement Form within five workdays and notify the institution by AIMS message router.

5.7 Appeal – Inmates may appeal the rating on the updated CCP to the Administrator, Offender Services Bureau, within five workdays of receipt of notification of the verified CCP.

5.7.1 Upon receipt of the appeal, the Administrator, Offender Services Bureau, shall have ten workdays in which to respond. His decision shall be final.

5.8 Concurrent Custody/Interstate Compact

5.8.1 For concurrent custody inmates serving an Arizona sentence in another jurisdiction, the inmate's Institutional Endorsement Form shall be calculated within 20 workdays of receipt of the certified commitment by Central Office. The Institutional Endorsement Form for Interstate Corrections Compact cases shall be calculated and processed in accordance with section 5.1.1, 5.4 and 5.5.

5.8.2 The concurrent custody case manager shall request a current progress report on concurrent custody inmates 180 days prior to the release eligibility date. Central Office Classification shall determine the eligibility of the inmate within ten workdays of receipt of the progress report and forward the Institutional

Endorsement Form to the concurrent custody case manager.

5.8.2.1 The inmate's CCP rating shall be determined by Central Office Classification based on progress reports from the other state or federal jurisdiction.

5.8.3 If the inmate meets the eligibility criteria, the concurrent custody case manager shall notify the other jurisdiction and drop the detainer on a concurrent custody case.

5.8.4 The Central Office Special Services Section shall coordinate the Earned Release Credit Date release process for Interstate Corrections Compact inmates with the concurrent custody case manager.

5.8.5 If the inmate does not meet the eligibility criteria, the Special Services Officer shall notify the other jurisdiction, and the concurrent custody case manager shall complete a new time computation.

5.9 Rescission of an approved Earned Release Credit Date release prior to the release of an inmate – if an inmate's CCP score changes from an eligible to an ineligible score as a result of a classification hearing, or when an inmate is convicted of a Group I or II violation of the Rules of Discipline, the Warden, Deputy Warden, or Administrator shall request a rescission of the Earned Release Credit Date release by completing the required sections of a new Institutional Endorsement Form.

5.9.1 The required sections include the inmate's name, ADC#, date of birth, institution location, and the request for rescission portion of the form.

5.9.2 The completed form shall be forwarded to the Administrator, Offender Services Bureau, for review and action.

5.9.3 Inmates may appeal the rating on the updated CCP to the Administrator, Offender Services Bureau, within five workdays of receipt of notification of the verified CCP.

5.10 Release Conditions – Inmates released under Earned Release Credit Date release shall not be supervised by the Department of Corrections.

5.10.1 Inmates released on provisional release shall be released from supervision on their Earned Release Credit Date, unless the provisional release is rescinded.

5.10.2 Inmates who have signed a Provisional Release Waiver, who are eligible for Earned Release Credit Date release, shall be released on their Earned Releases Credit Date.

5.10.2.1 Inmates may *not* waive an Earned Release Credit Date release.

5.11 Inmates Released on Parole – The Time Computation Unit shall calculate an Earned Release Credit Date for all inmates released on parole to include all release credits earned.

5.11.1 Inmates shall not earn release credits while on parole.

5.12 Absolute Discharge – Inmates on parole status shall be referred to the Arizona Board of Pardons and Paroles for consideration of Absolute Discharge on their Earned Release Credit Date.

5.12.1 The Time Computation Unit shall compile an Earned Release Credit Date/Absolute Discharge eligibility list each month.

5.12.2 The Earned Release Credit Date/ Absolute Discharge eligibility list shall be sent to the Arizona Board of Pardons and Paroles and the Community Corrections Division sixty days prior to the Earned Release Credit Date.

5.12.3 The Community Corrections Division shall review the list and forward any comments or recommendations to the Board of Pardons and Paroles thirty days prior to the Earned Release Credit Date.

5.12.4 If the Board of Pardons and Paroles denies the Absolute Discharge, the inmate shall remain under parole supervision until the Sentence Expiration Date or until released by other means.

5.12.5 If the Board of Pardons and Paroles approved the Absolute Discharge, the Director of the Department of Corrections shall release the inmate from parole supervision and issue an

Absolute Discharge, ADC Form #41002001.

6.0 *IMPLEMENTATION*: Implementation shall occur on the effective date of this Order. This Order shall remain in effect until replaced by permanent Department policy or rescinded.

/s/ Samuel A. Lewis
Samuel A. Lewis
Director

Forms
Certificate of Absolute Discharge, ADC Form #41002001.
Institutional Endorsement Form, ADC Form #70501069.